FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 25 | ) | MM Docket No. 93-25 |
| of the Cable Television Consumer | ) | |
| Protection and Competition Act of 1992 | ) | |
| | ) | |
| Direct Broadcast Satellite | ) | |
| Public Service Obligations | ) | |



# SUPPLEMENTAL REPLY COMMENTS OF DIRECTV, INC.

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**SUPPLEMENTAL REPLY COMMENTS OF DIRECTV, INC.**

DIRECTV hereby submits the following supplemental reply comments in the above-captioned proceeding.

## I. THE COMMISSION SHOULD MAINTAIN A FLEXIBLE REGULATORY APPROACH IN IMPLEMENTING SECTION 335

As a part of the 1992 Cable Act, the DBS public service obligations required by Section 335 should be implemented in harmony with the overall purpose of that statute, *i.e.*, to foster effective competition with cable television operators by encouraging the development of alternative MVPD technologies such as DBS. An overly restrictive approach to the implementation of Section 335 -- one that would narrow unnecessarily the sources of public service programming from which DBS providers can draw upon to meet the obligation, or that would relegate DBS program carriage obligations to a cable leased access model -- does not advance this goal. While many programmers and DBS providers have made this point,[1]

[1] *See* Comments of America's Health Network at 4-6; Comments of American Sky Broadcasting LLC at 15, 19; Comments of Knowledge TV at 7-9; Further Comments of Primestar Partners

DIRECTV offers below several observations with respect to the supplemental comments that have been submitted.

### A. Carriage Obligations for Noncommercial Educational or Informational Programming

With respect to the program carriage obligations set forth in Section 335(b), DIRECTV stresses the need for the Commission to grant DBS providers maximum flexibility to choose an optimal "mix" of quality educational or informational programming. Contrary to the views of DAETC and a few other parties, Section 335 does *not* preclude the adoption of an expansive view of eligible sources of noncommercial programming of an educational or informational nature.

- **Definition of "National Educational Programming Supplier"**

Section 335(b)(3) requires that a DBS provider meet the requirements of the statute by making its channel capacity available to "national educational programming suppliers." Whether that term is read as a subset of Section 335(b)(1)'s definition of a larger pool of noncommercial educational or informational programming, as DIRECTV has urged, or is construed broadly to encompass a wide range of providers, as others have advocated,[2] the Commission should interpret the statute to permit a diverse array of quality programming from various sources to satisfy the Section 335 requirements.

APTS and PBS have presented a different view of Section 335, claiming that "national education program suppliers," narrowly defined, are the exclusive class of suppliers

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L.P. at 5; Comments of Satellite Broadcasting and Communications Association at 6-8; Comments of Tempo at 11-13.

2 *See, e.g.,* Comments of Knowledge TV at 8; Comments of Tempo at 11-12.

that may gain access to DBS capacity reserved pursuant to Section 335. This construction, however, reads the express provision of capacity for noncommercial "informational" programming in Section 335(b)(1) out of the statute.[3] It also makes little policy sense. Congress desired to encourage DBS to make available to the public a wide array of diverse, noncommercial educational and informational programming from a variety of suppliers -- including, but not limited to, the narrow class of programmers that APTS' position would exclusively favor.

DIRECTV believes that there is much room in the statute for provider and programmer flexibility in acquiring and supplying quality noncommercial programming that meets the letter and the spirit of Section 335. DIRECTV agrees with Encore, for example, that Section 335 noncommercial educational or informational programming can and should include noncommercial programming supplied by private corporations.[4] Offerings such as Encore's noncommercial "WAM!" network, which is dedicated to serving the needs of 8- to 16-year-old children,[5] as well as programming aired on The Learning Channel, The Discovery Channel and Animal Planet[6] are plainly of the type envisioned by Congress to fulfill Section 335 obligations, and should be allowed to do so. DIRECTV also agrees that religious[7] and political[8] programming may qualify for purposes of meeting Section 335(b) carriage obligations.

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3 47 U.S.C. § 335(b)(1).

4 Comments of Encore Media Corporation at 5-12.

5 *Id.* at 3.

6 *See* Further Comments of Primestar at 23.

7 *See* Comments of Dominion Video Satellite, Inc., at 2-3.

8 *See* Comments of ASkyB at 18.

- **Rates charged to "National Educational Programming Suppliers"**

Section 335(b)(4)(B) requires that the price for a channel made available to "national educational programming suppliers" under Section 335(b)(3) not exceed 50% of the "total direct costs" to the DBS provider of making the channel available.[9] While Section 335(b)(4)(C) denotes certain specific costs that should be excluded from the calculation of "direct costs," it does not preclude the Commission from identifying other costs that are properly included within the calculation. Contrary to the unsupported suggestion of DAETC that the statute requires an exceedingly narrow definition of "direct costs" that may be charged by DBS providers,[10] the *Initial Notice* correctly observed that neither the text nor the legislative history of Section 335 has "specifically excluded" the primary costs of launching and distributing DBS service that DIRECTV strongly believes should be included in the calculation of a DBS provider's "direct cost" base.[11] In DIRECTV's view, these costs include: the costs of receiving program providers' signals at the DBS provider's uplink facility; the costs of uplinking the signal, including continuing costs of operating and maintaining the uplink facility; personnel and administrative costs related directly to the carriage of programming offered by national educational programming suppliers; costs of construction, launch, operation and insurance of the satellite and the uplink facilities; and costs associated with the packaging and distribution of noncommercial services, including conditional access and billing. Interpreting Section 335 to prohibit DBS providers from recovering such costs would impose a needless and onerous burden upon them, when there is simply no evidence

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9 47 U.S.C. § 335(B)(4)(B).

10 Comments of DAETC at 22-23.

11 *Initial Notice* at ¶ 50.

that permitting providers to recover such costs would "frustrate the intent of Congress" as DAETC suggests.[12]

- **"Editorial control"**

Section 335(b)(3) states that DBS providers "shall not exercise any editorial control over any video programming provided pursuant to this subsection."[13] Although DAETC and NATOA argue that this language removes from DBS providers all discretion to pick and choose from among a pool of eligible programmers in fulfilling their public service obligations,[14] this overly-restrictive reading simply does not follow from the language of Section 335(b). The mere decision to carry one program channel over another does not equate to "editorial control" -- any more than a "public library, book store or newsstand" can be said to exercise editorial control by virtue of selecting certain books or publications over others to offer to the public.[15] Once DIRECTV chooses to carry a program channel, it "exercises little or no editorial control over" that channel's content.[16] There is no good legal or public policy reason to construe the language of Section 335 more narrowly.

Even APTS and PBS agree that DBS providers should have discretion in picking and choosing particular suppliers of noncommercial programming as long as such providers do not exercise editorial control over the content of programming.[17] Neither the language nor the

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12 Comments of DAETC at 23.

13 47 U.S.C. § 335(b)(3).

14 Comments of DAETC at 18-19; Comments of Alliance for Community Media and the National Association of Telecommunications Officers and Advisors at 10.

15 *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

16 *Id.*

17 Comments of APTS and PBS at 34, 48, n. 56.

legislative purpose of Section 335 mandate a "first-come, first-served" cable leased access model for DBS that will yield only additional channels of unwatched programming. DBS providers should be entrusted with discretion to determine the optimal mix of programming that will enable them to fulfill their statutory public service obligations, while also attracting the greatest possible consumer interest.[18]

- **Non-Profit Industry Clearinghouse**

Many parties agree with DIRECTV that the voluntary creation of a non-profit clearinghouse, organized as a 501(c)(3) corporation, for the administration, selection and coordination of a pool of "pre-cleared" noncommercial educational or informational programming makes good policy sense, and provides a reasonable and practical method of administering Section 335 capacity obligations.[19] DIRECTV believes that the entity should be comprised of representatives of the DBS industry, public interest organizations and educational groups, and that its efforts be directed at selecting DBS public service offerings of the highest quality for inclusion in the pool. The clearinghouse's responsibilities would include: (1) setting standards and criteria for program eligibility; (2) screening programmer applicants that desire DBS carriage; and (3) serving as a forum for an ongoing dialogue among DBS representatives, public interest organizations and educational groups.

The only way the proposal can be achieved, however, is if all DBS providers come together, on a voluntary basis, to help fund it.[20] The Commission should therefore endorse

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18 *See* Comments of ASkyB at 19.

19 *See* Comments of ASkyB at 20; Further Comments of Primestar at 19; Comments of SBCA at 5.

20 DAETC suggests that the Commission "should require DBS providers to create and fund" a "Programming Consortium" that is a more extreme version of the 501(c)(3) clearinghouse proposed by the DBS industry. Comments of DAETC at v. Contrary to DAETC's suggestion,

the clearinghouse proposal, and encourage the participation of the entire DBS industry. This clearinghouse proposal has widespread industry support and should be promoted by the Commission. It is a logical and workable means of screening and creating a pool of quality educational or informational programming that can be evaluated and approved under uniform criteria developed to promote the goals of section 335.

- **4% Capacity Requirement and Phase-In of the Obligation**

Although certain parties have suggested that the Section 335(b) carriage obligation be set initially at 7%,[21] a Commission requirement that DBS providers set aside the highest percentage in the range specified in Section 335(b) is both unrealistic and unwise. DBS is a young and developing industry and DBS providers are still experimenting to find the right mix of *commercial* service packages and programming that will appeal to subscribers. Now that a public interest obligation has been added to the equation, the Commission should not risk a potentially severe disruption in DBS service growth by requiring DBS providers to absorb a capacity limitation of this nature in excess of 4%.[22]

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although Commission encouragement and guidance are welcomed, the Commission has no authority to order DBS providers to form either a programming consortium or a clearinghouse. Any such initiatives must be assumed on a voluntary basis by the industry. DAETC's proposal for direct Commission involvement has no basis in law.

21 *See* Comments of APTS and PBS at 36; Comments of Research TV at 11.

22 DAETC also has proposed a scheme that presupposes a capacity obligation in excess of 4%. DAETC, however, would permit capacity above 4% that cannot in good faith be filled with purely noncommercial programming to be filled with educational and informational programming that is 80% noncommercial and 20% commercial, with these "quasi-commercial" programmers required to donate 5% of their gross annual revenues to DAETC's proposed "Programming Consortium." Comments of DAETC at 15. This proposal should be summarily rejected. First, the Section 335(b) capacity obligation should not be set in excess of 4% for the reasons mentioned. Second, there is no basis for the Commission to impose obligations on programmers under Section 335. Finally, to the extent that DAETC's proposal is intended to apply to DBS operators, a mandated 5% "tax" on "quasi-commercial" programming has absolutely no legal or policy basis in the statute.

Along similar lines, there also is a clear need for a phase-in of the Section 335 carriage obligation, rather than the "flash-cut" that certain parties have proposed.[23] The creation of the proposed DBS clearinghouse, the establishment of programming criteria, and the initiation of administrative functions, for example, all will take time to implement. Furthermore, DBS providers need time to adjust their programming schedules and to give notice to their subscribers. In view of such practical necessities, it is neither realistic nor fair to expect Section 335 requirements to become effective immediately. Instead, the Commission should adopt a two-year phase-in of Section 335 obligations, as DIRECTV has proposed.

Finally, with respect to the capacity measurement and definition issues, the Commission should adopt the capacity reservation scheme proposed by DIRECTV, the SBCA, and others, which is reasonable and tied to the capacity reservation expressly called for in the statute.[24] The Commission also should affirm that the Section 335 obligation applies only to *video* -- as opposed to audio or data -- channels.[25] Congress clearly intended for the Section 335 obligations to apply to "video programming" provided by "a DBS system,"[26] and video channels

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23 Comments of APTS and PBS at 43; Comments of DAETC at 25.

24 *See* Supplemental Comments of DIRECTV at 6; Further Comments of Primestar at 16; Comments of SBCA at 11. By contrast, DAETC would impose 7 channels on a 110+ channel DBS system, with 1 channel added for every additional 15 channels over 110. Thus, for a 150 channel DBS system, DAETC's plan would result in a 9% capacity reservation --- a requirement well beyond the limits called for by Section 335(b).

25 DIRECTV has proposed that a "channel" for Section 335(b) purposes be defined as a "video channel offered to the public." Supplemental Comments of DIRECTV, Inc. at 6; *see* Comments of SBCA at 10.

26 Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. 102-862 (Sept. 14, 1992), ("1992 Cable Act Conference Report"), at 100.

therefore are the logical units in which a capacity obligation should be measured.[27] Attempts to broaden that requirement are unwarranted.[28]

### B. Public Interest Requirements Under Section 335(a)

Section 335(a) requires the Commission to apply the reasonable access and equal time requirements of Sections 312(a)(7) and 315 of the Communications Act, respectively, to DBS providers. These political broadcasting requirements, however, must be adapted to the DBS service. For example, it simply makes no sense for -- and the statute does not require -- the Commission to mandate "reasonable access" to DBS systems for "all federal candidates" as DAETC suggests.[29] Section 335 grants the Commission the discretion to adapt the requirements of Sections 312(a)(7) and 315 in light of the Congressional directive to "examine the opportunities the establishment of" DBS service "provides for the principle of localism."[30] The Commission already has recognized that the feasibility of permitting all federal candidates access to DBS depends upon the extent to which DBS providers offer local or regionalized programming.[31] Because DBS providers do not do so, and instead offer nationally designed and nationally configured services, it makes sense to limit DBS reasonable access obligations to

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27 See also Comments of SBCA at 9 ("video channel" capacity measurement "is realistic because it is only these channels to which consumers subscribe and view consistently").

28 If the Commission were to decide that audio channels should be included in the calculation of the Section 335(b) capacity obligation, DBS providers should be able to use noncommercial audio programming, such as National Public Radio, to meet the obligation.

29 Comments of DAETC at 8.

30 47 U.S.C. § 335(a).

31 Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, 8 FCC Rcd 1589 (1993) ("Initial Notice"), at ¶ 24.

federal elections for national offices, *i.e.*, President and Vice President. Any more localized obligations would be onerous and unworkable.[32]

In addition, DIRECTV reiterates the need for the Commission to permit DBS providers the reasonable discretion to control the placement of political ads on their systems. The Commission trusts the "good faith judgments" of broadcast licensees to provide reasonable access, including their discretion to "take into account their broader programming and business commitments," and should do so here as well.[33] Indeed, like DIRECTV, other parties have pointed out that, for the vast majority of channels that DBS providers carry, the provider exerts no control over program content and does not control sales of advertising time; in fact, standard program carriage contracts generally forbid the alteration of programming carried on the DBS system.[34] The Commission therefore should not impose access requirements with regard to those channels over which the DBS operator controls neither sales of advertising time or program content.[35] DIRECTV also reiterates its recommendation that DBS providers be accorded the option of placing all political advertisements on a single channel or limited number of specific

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32 DBS providers of course would not be precluded from providing access to other federal candidates, but such additional access should be within the DBS provider's discretion, and not mandated by the Commission.

33 Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 681 (1991).

34 *See, e.g.*, Comments of ASkyB at 5.

35 DAETC's suggestion that the Commission preempt DBS carriage contracts to permit candidates "reasonable access," Comments of DAETC at 9, calls for dramatic regulatory intervention that is counterproductive and unwarranted. If DBS providers are not living up to their reasonable access obligations, the Commission can deal with such matters on a case-by-case basis, considering "the circumstances surrounding a candidate's request for time and the station's response to the request." Codification of the Commission's Political Programming Policies, 7 FCC Rcd at 681. There is no reason for the Commission to preempt individually negotiated private contracts.

channels, which will provide another potentially attractive option for accommodating the interests of DBS providers, programmers, candidates and the viewing public.

Finally, the Commission should reject DAETC's proposal to use Section 335(a) to add an additional 3% capacity reservation requirement on top of the 4-7% reservation expressly called for by Section 335(b) for "civic, children's educational and/or fine arts programming."[36] First, the statutory authority for the Commission to mandate such an additional capacity reservation under Section 335(a) is questionable. The types of programming that DAETC wishes to be covered by Section 335(a) are perfectly capable of being encompassed by the capacity reservation specified by Congress in Section 335(b),[37] and the statute does not provide the Commission with unlimited authority to require that DBS capacity be used for particular purposes. Furthermore, although well-intentioned, DAETC's overzealous proposals would seriously hinder the development of DBS. Although DAETC praises the unlimited potential of DBS "as a vehicle to educate and inform Americans of all ages and socioeconomic backgrounds,"[38] DAETC errs in thinking that Section 335 can or should warrant the displacement of the independent business judgment and discretion of individual DBS entrepreneurs in favor of regulators to unlock that potential. DBS providers are just emerging as

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36 Comments of DAETC at 6-7.

37 DAETC, for example, argues that C-SPAN has become "the mistreated stepchild of the cable industry," and that to promote its viewership, such programming could be used by DBS providers to "meet" its invented Section 335(a) 3% "requirement" for civic and public affairs programming. Comments of DAETC at 4. DIRECTV agrees the public affairs programming shown on the C-SPAN services is valuable, which is why DIRECTV carries both C-SPAN and C-SPAN2. But C-SPAN is *precisely* the type of noncommercial educational or informational programming that Congress envisioned when it fashioned the capacity reservation required by Section 335(b). To the extent that C-SPAN is carried by DBS providers it should count towards meeting that obligation.

38 Comments of DAETC at 1.

the best MVPD alternative for customers still held hostage to high prices and poor customer service by their local cable systems. They should not be hindered by more regulation than is called for by Section 335.

## II. THE COMMISSION SHOULD RESIST THE EFFORTS OF THE CABLE INDUSTRY TO IMPEDE THE GROWTH OF DBS COMPETITION

Invoking the shibboleth of "regulatory parity," the cable industry has urged the Commission to impose the full panoply of Title VI and other cable regulations on DBS providers, including franchise requirements, must carry, leased access, and program access obligations.[39] This rulemaking proceeding is an utterly inappropriate forum for cable interests to plead their case for regulatory relief because such issues are clearly outside its scope. The cable proposals have no basis in Section 335. Moreover, the idea of saddling DBS providers with maximum regulation under Title VI in order to protect cable monopolists from "competitive disadvantage" is absurd. Many of the proposals of the cable industry purposely ignore not only key differences between individual MVPD services, but the fundamental fact that cable operators have market power and continue to dominate the MVPD industry. Others are simply illogical and misplaced. Without responding to the cable proposals in detail,[40] suffice to say that they would radically undercut the Congressional goal of reducing barriers to entry for emerging MVPD competitors. They therefore should be rejected in their entirety.

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39 Comments of Time Warner Cable at 6-38; *see also* Comments of the National Cable Television Association at 5-9; Comments of Small Cable Business Association at 25-32.

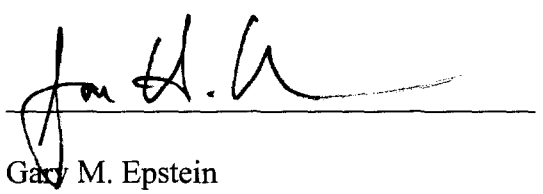
40 Should the Commission decide to expand this proceeding to encompass the additional obligations proposed by the cable industry, DIRECTV would be pleased to provide supplemental comment on them.

## III. CONCLUSION

DIRECTV strongly believes that the public interest will be served by ensuring that DBS providers have the discretion and flexibility to meet their public interest and program carriage obligations under Section 335 in a manner that increases the viewership, creativity and diversity of the educational or informational programming offered on DBS systems. Section 335 can and should be interpreted to advance that goal.

Dated: May 30, 1997

Respectfully submitted,



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